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NO. 83-1180

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LIANE BUIX MCDONALD, etc.,
Petitioner,

-vs-

UNITED AIR LINES, INC., et al.,
Respondents.

BRIEF OF RESPONDENT BARR IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Does the decision of the Court of Appeals that reinstatement of a hypothetical number of class members with full retroactive seniority would have "unusual adverse impact" constitute an advisory opinion in conflict with the decision of this Court in Teamsters v. United States, 431 U.S. 324, 376 (1977)?

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STATEMENT

1. Following this Court's decision in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), the Seventh Circuit held that each prospective class member in this case must establish that "her retirement was involuntary and on account of the invalid rule to be entitled to relief." McDonald v. United Air Lines, Inc., 587 F.2d 357, 360 n.4 (7th Cir. 1978).

Prior to the start of these individual entitlement determinations, the district court held a hearing to assess the "unusual adverse impact," Franks v. Bowman, 424 U.S. 747, 779 n.41 (1976) of reinstatement with full seniority. This hearing, which was conducted on the assumption that 1400 of the 1700 claimants would be found entitled to relief and would seek to return to work (Pet.App. 65a n.16) resulted in a finding by the district court that

reinstatement of 1400 claimants would be of "magnitude without precedent" (Pet.App. 87a), and constituted "unusual adverse impact" sufficient to deny full retroactive seniority. (Pet.App. 92a.)

Thereafter, respondent Barr (who had theretofore been represented as an unnamed member of the plaintiff class) suggested to the district court that the "unusual adverse impact" question should not have been decided on the hypothesis that 1400 claimants would return to work.[1] Barr asserted that not more than 300 claimants would be found entitled to be class members and would seek to return to a position they had left 15 years before. The

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[1] Barr contended that the class representative, who had already been reinstated with full retroactive seniority, had agreed to litigate class reinstatment issues on an inflated number of the number of returnees in order to increase the size of the class backpay award. (Pet.App. 9a-10a.)

district court refused to reconsider its reinstatement decision, but permitted Barr to appear individually.

3. On appeal from the reinstatement decision, the court of appeals noted that the threshold issue was whether "the number 1,400 is a reasonable estimate of persons who will seek reinstatement." (Pet. App. 11a.) The court below held that the teaching of Teamsters v. United States, 431 U.S. 324 (1977) is "that the reinstatement issues now before this court would be better addressed by the district court only after the number of persons at least entitled to reinstatement is determined." (App. 10a, emphasis in original)

The court of appeals chose not to await a final determination of the number of persons entitled to reinstatement "because a case that has already been unresolved too long threatens to extend indefinitely

if resolution of the seniority questions are delayed until completion of the class eligibility hearings." (Pet.App. 10a-11a.) On the assumption that 1400 claimants would be found entitled to relief and would seek reinstatment, the court of appeals affirmed the finding of the district court that reinstatement with full retroactive seniority would have "unusual adverse impact."

During the pendency of petitions for rehearing, Barr formally advised the court of appeals of the results in the first 209 entitlement hearings[2] and projected that not more than 500 claimants would be found

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[2] In 57 (or 27%) of the first 209 entitlement hearings, a special master found that the claimant had not lost her employment because of the no-marriage rule. This success rate is inflated by the fact that the district court has permitted claimants to defer their entitlement hearings. Claimants opting to defer their entitlement hearings have done so because they are not interested in reinstatement or because, based upon decisions in similar cases, they believe that they will not prevail.

entitled to any remedy. In responding to Barr's "suggestion of mootness," the petitioner agreed that "the number of class members eligible for reinstatement will be considerably less than the 1,400 relied upon by the [district] court." (Petitioner's Response to "Suggestion of Mootness," page 6.)

The court of appeals denied the petitions for rehearing and concluded that "the suggestion of mootness . . . was not well taken." (Barr App. 2.)

REASONS FOR GRANTING THE WRIT

1. In Teamsters v. United States, 431 U.S. 324 (1977), the Court made plain that "unusual adverse impact" should not be assessed "until [entitlement] hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined." Id. at 376.

In this case, as in Teamsters, "a substantial number of individual determinations [will be required] in deciding which of the minority employees were actual victims of the company's discriminatory practices." 431 U.S. at 371-72. But "[u]ntil those hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined, it is not possible to evaluate abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the contractual rights of non-victim employees." Id. at 376.

The decision of the court of appeals in this case is flatly at odds with Teamsters. The departure of the court below from Teamsters has resulted in "an opinion advising what the law would be upon a hypothetical state of facts" contrary to

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937). While the court of appeals sought to justify its advisory opinion "because a case that has already been unresolved too long threatens to extend indefinitely" (Pet.App. 10a-11a), this was error: "However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions." FCC v. Pacifica Foundation, 438 U.S. 726, 735-36 (1978).

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted and the decision of the court of appeals vacated.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CAROLE ANDERSON ROMASANTA, et al., Plaintiffs, and LIANE BUIX McDONALD, etc., Plaintiff-Appellant, Cross-Appellee,	)	
-vs-	)	82-2660 82-2661
UNITED AIR LINES, INC. et al., Defendant-Appellee, Cross-Appellant.	)	

November 18, 1983

Before Pell and Cudahy, Circuit Judges, and Gibson, Senior Circuit Judge (of the Eighth Circuit, sitting by designation)

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Joyce Barr, intervenor, no judge in active service having requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

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** Judge Posner did not participate in the consideration of the decision of the petition for rehearing en banc.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

While the above petition for rehearing was pending, the intervenor, Joyce Barr, filed her suggestion of mootness requesting the court to vacate its decision and remand the case to the district court with instructions to consider the question of mootness. The court, being of the opinion on consideration of the suggestion of mootness and the responses thereto that the suggestion was not well taken, the requested relief is DENIED.